Siang Yam Beng v Marushin Canneries (M) Sdn Bhd & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22-250-1993
ABDUL MALIK ISHAK J
6 AUGUST 1995

Agency *— Authority of agent — Implied authority — One of two directors/guarantors appointing solicitor to represent them and company in suit brought by creditor — Other director/guarantor could not be located — Consent judgment entered and extracted — Whether solicitor had implied authority to act for other director/guarantor*

Civil Procedure *— Consent order — Setting aside, application for —Extracted order — Whether court could vary or alter such order*

Contract *— Guarantee — Execution of undated guarantee — Whether guarantor bound by guarantee*

The first defendant company obtained judgment against company M in an earlier suit. M settled the judgment debt only in part. The plaintiff and one Lee were directors of M and guaranteed the outstanding amount due to the first defendant. The guarantee was undated. Lee then appointed the second defendant law firm to represent him, M and the plaintiff (in his absence as he could not be located), to protect the interests of all the defendants in that earlier suit. The second defendant negotiated the settlement terms and a consent judgment was entered between all the parties. The sealed copy of the consent judgment was extracted. The plaintiff now claimed that he only learned of the earlier suit when he was served with a bankruptcy notice a year later. He denied authorizing Lee to act on his behalf and brought an action to impeach the consent judgment obtained in the earlier suit. The defendants sought to strike out the action by the present application.

Held, allowing the application:

(1) An application to strike out pleadings under O 18 r 19(1) of the Rules of the High Court 1980 must not be considered with evidence. However, the courts have now resorted to the affidavits to adjudicate such applications. Affidavits in support of such applications should contain particulars and not bare averments. Even after pleadings are closed, applications for striking out may still be made so long as the action has not been set down for trial.

(2) Since the sealed copy of the consent judgment had been extracted, the court did not have the power to recall its judgment. A consent judgment which had been perfected and extracted could not be rectified by alteration or variation.

(3) The second defendant had implied authority to act for the plaintiff in the earlier suit.

(4) While the general rule was that no person was to be adversely affected by a judgment in an action he was not a party to, there were two exceptions: a privy who was estopped by res judicata, and a person whose conduct precluded him from challenging the judgment.

(5) The guarantee agreement was valid even though it was undated when signed, because it had been signed by a director and there was no fraud or misrepresentation.

[Bahasa Malaysia summary

Syarikat defendan pertama memperolehi penghakiman terhadap syarikat M dalam guaman yang terdahulu. M hanya menyelesaikan sebahagian daripada hutang penghakiman itu. Plaintif dan seorang Lee adalah pengarah-pengarah M dan menjamin jumlah yang terhutang yang perlu dibayar kepada defendan pertama. Gerenti itu tidak bertarikh. Lee kemudiannya melantik syarikat guaman defendan kedua untuk mewakilinya, M dan plaintif (dalam ketiadaannya kerana beliau tidak dapat ditemui), untuk melindungi kepentingan semua defendan-defendan dalam guaman yang terdahulu itu. Defendan kedua membuat rundingan berkenaan dengan terma-terma penyelesaian dan suatu penghakiman persetujuan dimasukkan di antara semua pihak. Salinan penghakiman persetujuan yang dimeterai diekstrak. Plaintif sekarang menuntut bahawa beliau hanya mengetahui mengenai guaman yang terdahulu itu apabila beliau disampaikan dengan notis kebankrapan setahun kemudian. Beliau menafikan membenarkan Lee untuk bertindak bagi pihaknya dan mengambil tindakan untuk mencabar penghakiman persetujuan yang diperolehi dalam guaman yang terdahulu itu. Defendan-defendan memohon untuk membatalkan tindakan tersebut dengan permohonan sekarang.

Diputuskan, membenarkan permohonan:

(1) Permohonan untuk membatalkan pliding di bawah A 18 k 19(1) Kaedah-Kaedah Mahkamah Tinggi 1980 tidak boleh diberi pertimbangan dengan keterangan. Bagaimanapun, mahkamah-mahkamah kini telah menggunakan afidavit untuk membuat keputusan berkenaan dengan permohonan-permohonan seumpama ini. Afidavit menyokong permohonan-permohonan itu hendaklah mengandungi butir-butir dan bukannya sekadar tegasan sahaja. Walaupun selepas penutupan pliding, permohonan untuk membatalkan masih boleh dibuat selagi tindakan itu belum ditetapkan untuk perbicaraan.

(2) Oleh kerana salinan penghakiman persetujuan yang dimeterai telah diekstrak, mahkamah tidak mempunyai kuasa untuk memanggil balik penghakimannya. Penghakiman persetujuan

yang telah disempurnakan dan diekstrak tidak boleh dibetulkan dengan pindaan atau pengubahan.

(3) Defendan kedua mempunyai kebenaran tersirat untuk bertindak bagi pihak plaintif dalam guaman yang terdahulu.

(4) Sementara peraturan amnya adalah bahawa tidak ada seseiapa pun yang boleh dijejaskan oleh penghakiman dalam tindakan di mana beliau bukan satu pihak, ada dua pengecualian: suatu privi yang diestop oleh res judicata, dan seorang yang mana kelakuannya menghalang beliau daripada mencabar penghakiman tersebut.

(5) Perjanjian gerenti itu adalah sah walaupun ianya tidak bertarikh semasa ditandatangani, kerana ia telah ditandatangani oleh pengarah dan tidak ada fraud atau salah nyata.]

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287 (refd)

Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor [1978] 2 MLJ 78 (folld)

Abuakwa v Adanse [1957] 3 All ER 560 (distd)

Amir Kahar bin Tun Haji Mustapha Datuk (Datu) v Tun Mohd Said bin Keruak [1994] 3 MLJ 737 (refd)

Arjunan & Ors v Kesatuan Kebangsaan Pekerja-Pekerja Ladang [1993] 1 MLJ 326 (folld)

Avro International, The [1988] 1 MLJ 147 (refd)

Bank Bumiputra Malaysia Bhd & Anor v Lorraine Esme Osman [1987] 2 MLJ 633 (folld)

Bozson v Altrinchman Urban District Council [1903] 1 KB 54 (refd)

Credit Corp (M) Bhd v Complete Information Search Sdn Bhd & Ors [1993] Mallal's Digest 141 (refd)

Curtis v Chemical Cleanning & Dyeing Co Ltd [1951] 1 All ER 631 (refd)

Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd [1972] 1 MLJ 168 (refd)

Faizil bin Mohamed Noor v Universiti Teknologi Malaysia [1981] 2 MLJ 196 (refd)

Haron bin Mohd Zaid v Central Securities (Holdings) Bhd [1982] 2 MLJ 94 (folld)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp [1994] 1 MLJ 312 (distd)

Hock Hua Bank Bhd v Sahari bin Murid [1981] 1 MLJ 143 (folld)

L 'Estrange v F Graucob Ltd [1934] 2 KB 394 (folld)

Lawrance v Norreys (Lord) (1890) 15 App Cas 210 (refd)

Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd [1990] 2 MLJ 423 (folld)

Marsden v Marsden [1972] 2 All ER 1162 (distd)

New Straits Times (M) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 227 (refd)

Ng Kian Chong v Saw Seng Kee [1994] 2 AMR 2651 (refd)
Oh Kuang Siang v Associated Wood Industries Sdn Bhd [1995] 2 AMR 1872 (folld)
Pakianathan (S) v RK Stallard [1979] 2 MLJ 251 (distd)
Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 (folld)
Scott & English (M) Sdn Bhd v Yek Toh Ming [1985] 1 MLJ 451 (refd)
Sheldon v Brown Bayley's Steel Works Ltd [1953] 2 QB 393 (refd)
Tah Ah Yeo v Seow Teck Ming [1989] 2 MLJ 3 (distd)
Tan Lian Hong v Ming Ngai Knitting Factory (M) *Ltd & Anor* [1974] 2 MLJ 76 (distd)
Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (folld)
Tunku Abdul Rahman Putra Al-Haj v Dato' Seri Dr Mahathir Mohamad [1989] 1 MLJ 48 (refd)
Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd [1988] 2 CLJ 861 (refd)
Yap Chee Meng v Ajinomoto (M) Bhd [1978] 2 MLJ 248 (folld)

Legislation referred to

Rules of the High Court 1980 O 14, O 18 r 19, O 20 r 11 O 41

Suria Kumar DJ Paul (*Sivam*) for the plaintiff.
Sunita S Sothi (*Brockett & Cho*) for the first defendant.
Zaferi bin abdullah (*Siti Rubiah Ong & Co*) for the second defendant.

Abdul Malik Ishak J: This was an application by way of summons-in-chambers (encl 21) of the first defendant (hereinafter referred to as 'Marushin') for the following prayers:

(1) that the writ of summons and the statement of claim (since amended by order of the court dated 27 October 1991 as reflected in encl 10) filed by the plaintiff (one Siang Yam Beng hereinafter referred to as 'Siang') be struck out pursuant to the Rules of the High Court 1980 ('the RHC'), O 18 r 19 and under this honourable court's inherent jurisdiction for the following reasons:
    (i) that it does not show any reasonable cause of action; or
    (ii) it is scandalous, frivolous or vexatious; and/or
    (iii) it is an abuse of process of this honourable court; and
(2) that all further proceedings in this action be stayed pending the final disposal of this application; and
(3) that Marushin be allowed extension of time to file a statement of defence, if necessary, after the final disposal of this application; and
(4) such further order or direction as this honourable court deems fit; and
(5) that the costs for this application and costs for the striking out of the writ of summons and the statement of claim (now amended as per encl 10) be paid by Siang to Marushin.

Enclosure 21 was supported by an affidavit of one Hidemi Kimura, the General Manager of Marushin affirmed on 16 December 1993 (encl 21A) and in that affidavit the following facts were chronologically itemised. On 1 February 1992, it was deposed that Marushin filed a writ of summons in the High Court, Johor Bahru vide Civil Suit No 22–25 of 1992, and for convenience and to avoid confusion the parties to Civil Suit No 22–25 of 1992 are set out hereinafter as:

Civil Suit No: 22–25 of 1992

Between

Marushin Canneries (M) Sdn Bhd ... Plaintiff

And

(1) Malindo Venture Sdn Bhd

(2) Siang Yam Beng

(3) Lee Tick Eing ... Defendants

As I said earlier, Marushin filed the Civil Suit No 22–25 of 1992 as plaintiff and cited as defendants, a company known as Malindo Venture Sdn Bhd (hereinafter referred to as 'Malindo'), Siang and Lee Tick Eing (hereinafter referred to as 'Lee') principally to demand for a sum of RM137,180 together with interest at the rate of 8% from the date of judgment until the date of settlement and cost.

For convenience, I shall hereinafter refer to the Civil Suit No 22–25 of 1992 as the 1992 suit and Civil Suit No 22–250 of 1993 as the present suit.

Reverting back to the facts of the case, Marushin's claim in the 1992 suit against all the defendants there was in regard to the supply of 3,003 cases of 7-Eleven Brand Red Lithographed Canned Sardines In Tomato Sauce to the value of RM180,180, which sum was not paid. Malindo in the 1992 suit paid RM43,000 to Marushin in the present suit and refused to pay the balance despite repeated reminders. Both Siang and Lee in the 1992 suit became guarantors by a guarantee agreement dated 21 October 1991 wherein they both jointly and severally undertook, in the event Malindo in the 1992 suit failed to settle the amount due and owing, to make full and prompt payment to Marushin in the present suit of all sums due and owing then. At all material times, Siang and Lee in the 1992 suit were the directors of Malindo. On 10 March 1992, the writ of summons and the statement of Claim in the 1992 suit were served on Lee (see the affidavit of service marked as exh 'C' in encl 21A). By fascimile (exh 'D' in encl 21A) dated 10 March 1992, Tetuan Siti Rubiah & Ong in the present suit wrote to Messrs Brockett & Cho, Advocates and Solicitors, who were the solicitors for Malindo in the 1992 suit to the effect that Tetuan Siti Rubiah & Ong in the present suit represented Malindo, Siang and Lee in the 1992 suit. As if to add sanctity to what Tetuan Siti Rubiah & Ong in the present suit had said in that fascimile message, a memorandum of appearance dated 11 March 1992 was filed by Tetuan Siti Rubiah & Ong on behalf of Malindo, Siang and Lee in the 1992 suit (see exh 'E' in encl 21A). Tetuan Siti Rubiah & Ong in the present suit by letter dated 20 July 1992 wrote to

Messrs Brockett & Cho, Advocates and Solicitors, who were acting for Malindo in the 1992 suit, stating that Malindo, Siang and Lee in the 1992 suit had agreed to record consent judgment in the terms of the draft consent judgment as exhibited in exh 'F' in encl 21A. On these set of facts, Hidemi Kimura deposed that the present suit did not show any reasonable cause of action and/or that it was frivolous or vexatious or an abuse of the process of the court.

Tetuan Siti Rubiah & Ong in the present suit filed a similar application like Marushin in the present suit under RHC O 18 19 to strike out the amended writ of summons and the statement of claim in encl 10 of Siang in the present suit (see encl 37). Enclosure 37 was supported by an affidavit of Ong Sin Hock affirmed on 10 April 1995. As an advocate and solicitor of Tetuan Siti Rubiah & Ong in the present suit, Ong Sin Hock deposed that Lee in the 1992 suit gave the greenlight for him to do the needful to protect the interests of Malindo, Siang and Lee in the 1992 suit. By letter dated 9 March 1992, Lee in the 1992 suit gave specific instructions to Ong Sin Hock in the following fashion:

Lee Tick Eing
c/o Malindo Venture Sdn Bhd
23A, Jalan SS22/19
Damansara Jaya
47400 Petaling Jaya.

9 March 1992

Mr Ong Sin Hock
c/o Siti Rubiah, Ong & Co
47A Jalan SS22/23,
Damansara Jaya,
47400 Petaling Jaya,
Selangor Darul Ehsan.

Dear Sir,
Johor Bahru High Court SN 22–25–1992 '
Between Marushin Canneries MJ Sdn Bhd v
Malindo Venture Sdn Bhd & 2 Others

I refer to the above matter.

I had earlier signed a Warrant to Act giving you full authority to act on my behalf.

However, since I am still unable to locate Mr Siang, who is also one of the Directors of Malindo Venture Sdn Bhd, I hereby authorize you to act on his behalf so as to protect his interests.

Therefore, I would sincerely hope that you would take all necessary steps in the meantime to protect both our interests.

As such, I hope you shall act accordingly.

Yours faithfully,

(sgd) Illegible
(LEE TICK EING)

Ong Sin Hock acted professionally on behalf of Malindo, Siang and Lee in the 1992 suit and he proceeded to negotiate with Marushin in the 1992 suit. That negotiation turned out to be a success and by letter dated 10 March 1992, Ong Sin Hock forwarded the terms of the settlement in the following manner:

Siti Rubiah Ong & Co
Advocates & Solicitors

Ong Sin Hock
Siti Rubiah M Bamadhaj

No: 47A,1st Floor
Jalan SS22/23
Damansara Jaya
47400 Petaling Jaua
Selangor Darul Ehsan

Our Ref: 0154/L(2)92

Date:10 March 1992

M/s Brockett & Cho,
Advocates & Solicitors
4th Floor, Bangunan Kuok Bros
35–36 Jalan Trus
80000 Johor Bahru

Fax No 07–242918/Post

WITHOUT PREJUDICE

Dear Sir,

Re: JB High Court Civil Suit No: 22–25–1992

Between Marushin Canneries (M) Sdn Bhd (P) & Malindo Venture Sdn Bhd & 2 Others (D)

We act for the abovenamed defendants who have forwarded to us the copy of the said Summons with instruction to reply thereto.

We are pleased to inform that our clients are desirous of settling the matter by appealing to your clients to consider the following:

(1) To pay the sum of RM137,180.00 in 24 equal monthly instalments of RM5,715.80 each commencing from 20 March 1992 followed by each succeeding month thereof.

(2) That the interest element be waived off.

(3) Agreeable to RM300.00 costs only.

Thus, if the above proposal is accepted by your clients, our instructions are to seek your cooperation to enter consent judgment based on such terms as proposed herein.

Kindly revert to us soonest after seeking your clients' instructions and agreement thereto.

Yours faithfully,

Siti Rubiah Ong & Co

cc Client

Before the Senior Assistant Registrar, High Court Johor Bahru dated 22 July 1992 a consent judgment was entered between all the parties to the 1992 suit and that consent judgment has since been perfected and extracted (ironically this was exhibited by Siang in the present suit in his first affidavit-in-reply affirmed on 26 May 1995 in encl 40, exh 'A')

Siang in the present suit contested enclosures 21 and 37 and deposed in encl 40 that he only knew of the 1992 suit after he was served with a bankruptcy notice on 26 April 1993 together with the consent judgment for the 1992 suit. Siang in the present suit further deposed that he was not served with the writ of summons and the statement of claim to the 1992 suit and at no time did he discuss with Malindo and Lee in the 1992 suit for a settlement as alleged. Siang in the present suit deposed that on 9 March 1992, he proceeded to the United States of America with his wife and that he only returned to the country on 19 March 1992 and in support of this averment Siang in the present suit enclosed his international passport marked as exh 'C' in encl 40. But a check with that international passport revealed that on those dates Siang in the present suit was in Canada and not in the United States of America as alleged. Be that as it may, Siang in the present suit deposed further that he resigned as a director of Malindo in the 1992 suit on 24 August 1991 (see exh 'D' of encl 40) and that he did not appoint nor direct Lee in the 1992 suit as his agent. Siang in the present suit denied that he appointed or directed Lee in the 1992 suit to file the memorandum of appearance on his behalf in the 1992 suit. Siang in the present suit also denied appointing or directing Lee in the 1992 suit to make an offer of a settlement with a 'without prejudice' label on it in regard to the 1992 suit. Siang in the present suit further denied appointing Tetuan Siti Rubiah & Ong in the present suit to represent him in the 1992 suit. Though Siang in the present suit admitted signing the guarantee agreement yet he alleged that when he signed it, it was undated. Siang in the present suit further averred that Lee in the 1992 suit and Tetuan Siti Rubiah & Ong in the present suit were not authorized to record consent judgments for and on his behalf. Finally, Siang in the present suit deposed that he had discussed with Lee on 26 April 1993 in regard to the 1992 suit.

A B C D E F

It is crystal clear that the present suit was filed by Siang to redress the purported wrong done to him in the 1992 suit.

Both Marushin and Tetuan Siti Rubiah & Ong in the present suit as reflected in encls 21 and 37 respectively complied with *Wagon Engineering Sdn Bhd v Sulaiman Buloh Semenanjung Enterprise Sdn Bhd* [1988] 2 CLJ 861, where Siti Norma Yaacob J (now JCA) observed:

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> ... I need to point out that it is very important that the plaintiff should state categorically under which Order or Rule of the Rules of the High Court that it is proceeding with, so as to give the defendant due notice of the nature of the application to enable it to direct its mind as to the issues that are really in dispute. The plaintiff should elect whether it wished to proceed under O 18 r 19 or under O 14, but it cannot proceed on both.

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Here both Marushin and Tetuan Rubiah & Ong in the present suit selected RHC O 18 r 19 to ground their application against Siang.

I

Pleadings may be struck out on the following grounds (see RHC O 18 r 19(1)):

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court.

and these grounds may overlap and at times merge with one another thereby giving it a shot in the arm, so to speak, for the applicants (*Tunku Abdul Rahman Putra Al-Haj & Ors v Dato Seri Dr Mahathir Mohamad* [1989] 1 MLJ 48 may serve as a striking example of overlapping). Both Marushin and Tetuan Siti Rubiah & Ong in the present suit relied on grounds (a), (b) and (d) of RHC O 18 r 19(1) and even though they are not bound to file affidavits-in-support of their applications (see *Datuk (Datu) Amir Kahar bin Tun Haji Mustapha v Tun Mohd Said bin Keruak* [1994] 3 MLJ 737 as applied in *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287), yet they both adopted the safest course by filing affidavits as can be seen through the facts as narrated in the early part of this judgment. It is pertinent to mention that though RHC O 18 r 19(2) states that 'no evidence shall be admissible on an application under paragraph (1)(a)', yet the courts in this country have resorted to the affidavits and the pleadings — to look, decide and weigh in a balance its contents in the course of adjudicating applications under this order. By way of an example, I need only quote the decision of Mohamed Azmi FJ (now FCJ) in *New Straits Times (Malaysia) Bhd v Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 at p 227 where his Lordship said:

> It is therefore clear law that in an application to strike out pleadings under O 18 r 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the Statement of Defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable ...

In *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1, the Privy Council seems to imply that the courts are not precluded from looking at affidavits in order to ascertain whether the pleadings ought to be struck out and the action dismissed. Lord Diplock in delivering the judgment of the Board had this to say (at p 1 col 2C–F):

> The power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution. Had the matter depended upon the contents of the Statement of Claim alone, their Lordships would have been loth to differ from the opinion of the Federal Court that, despite imperfections in drafting (which however might have been capable of cure by amendment) the Statement of Claim, at any rate as respects some of the claims to alternative relief, did raise questions of law that were sufficiently arguable to justify proceeding to trial. In refusing to submit the evidence to critical examination, however, the Federal Court erred in law. This makes it necessary for their Lordships to state briefly the facts disclosed by the evidence which, in their view, lead to the conclusion that the new action could not possibly succeed.

But I venture to say that affidavits filed in support of an application under RHC O 18 r 19(1) must condescend to particulars and should not contain bare averments which are hopeless in nature. I have said in *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* (supra), particularly at p 293:

> In my judgment, affidavits play a crucial role in originating summonses as submissions and decisions are primarily hinged on affidavit evidence. I am sure the plaintiff being a lawyer should know the value of affidavit evidence in an application of this nature. He should know and cannot be said not to know that affidavits should contain facts known to him and not legal arguments and submissions of law (*Alfred Dunhill Ltd v Sunoptic SA* [1979] FSR 337 at pp 352 and 373). It is germane to mention that the basic rules of affidavit practice are contained in O 41 of the Rules of the High Court 1980 ('RHC') and legal practitioners are encouraged to refer to it.

In *Abu Bakar bin Haji Yusuf v Mohamed Hamzah bin Hanapiah & Anor* [1978] 2 MLJ 78, in an application to strike out a pleading the court there looked at the affidavits in order to garner the history of the whole matter and decided to strike out the pleading and dismissed the action.

Marushin and Tetuan Siti Rubiah & Ong in the present suit rightly applied for striking out by way of summons-in-chambers after the offending pleading was served. Even after the pleadings are closed, applications for striking out could still be made provided the actions have not been set down for trial (*Bank Bumiputra Malaysia Bhd & Anor v Lorrain Esme Osman* [1987] 2 MLJ 633. If at all, non-compliance with RHC O 18 r 19(1) would not make an application under it fatal (*Arjunan & Ors v Kesatuan Kebangsaan Pekerja-pekerja Ladang & Ors* [1993] 1 MLJ 326).

The courts are always wary and will thread cautiously before summarily striking out the statement of claim and barring the plaintiff access to trial by calling witnesses. Lord Diplock in *Tractors Malaysia Bhd v Tio Chee Hing* (supra) described that power as drastic and I may add it is also draconian in nature. Seah FJ (as he then was) in *CC Ng & Brothers Sdn Bhd v Government of State of Pahang* [1985] 1 MLJ 347 at p 350 referred to *Lawrance v Lord Norreys* (1890) 15 App Cas 210, 219 and quoted the words of Lord Herschell in that case to the following effect:

> It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

For completeness, it is not out of place to mention that the principles in striking out under an O 14 application have been ventilated in *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 AMR 2651 and I need not dwell upon it at length. Reference to that case will surely shed light to some dark areas of the law.

Pertamina v Kartika Ratna Thahir & Ors [1983] 1 MLJ 136 lays down the now famous principle that only in plain and obvious cases should recourse be had to the summary process under RHC O 18 r 19. The question to ask in regard to the present suit is this: Is it that plain and obvious for this court to strike out the writ and the statement of claim of Siang in the present suit?

Now, the consent judgment that had been perfected and extracted in regard to the 1992 suit tied up all the parties thereto. Siang in the present suit says that he is not bound by the 1992 suit for four main reasons:

(1) he did not receive the writ and the statement of claim to the 1992 suit;

(2) he did not discuss with Lee in the 1992 suit pertaining to the settlement which led to the consent judgment;

(3) he did not authorize Tetuan Siti Rubiah & Ong in the present suit to act for him and to enter into the consent judgment for the 1992 suit; and

(4) he was in Canada at the material time.

Two things immediately come to the forefront. Firstly, the consent judgment in the 1992 suit was not in its draft stage that required perfection and approval like the case of *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corporation* [1994] 1 MLJ 312. Secondly, the sealed copy of the consent judgment in the 1992 suit had been extracted unlike the case of *Tan Ah Yeo & Anor v Seow Teck Ming & Anor* [1989] 2 MLJ 3 where the seal copy of the order has not been perfected and therefore the court has the power to recall its judgment, alter or vary it at any time. However, lest I be accused of an oversight, I am not unmindful of what Chang Min Tat FJ (as he then was) said in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] 1 MLJ 143. In that case his Lordship observed at p 144:

> Clearly the court has no power under any application in the same action to alter, vary or set aside a judgment regularly obtained after it has been entered or an order after it is drawn up, except the slip rule in O 28 r 11 Rules of the Supreme Court 1957 (O 20 r 11 Rules of the High Court 1980) so far as is necessary to correct errors in expressing the intention of the order ... unless it is a judgment by default or made in the absence of a part at the trial or hearing. But if a judgment or order has been obtained by fraud or where further evidence which could not possibly have been adduced at the original hearing is forthcoming, a fresh action will lie to impeach the original judgment.

The present suit instituted by Siang therein can be described, to borrow the words of Chang Min Tat FJ, as a fresh action to impeach the consent judgment in the 1992 suit.

The amended writ of summons and the statement of claim of the present suit in encl 10 did not seek to apply the slip rule nor was there an allegation that the consent judgment to the 1992 suit was entered

through fraud. In my judgment, there was no slip in entering the consent judgment for the 1992 suit nor was there fraud to vitiate the same. It is also my judgment, that the consent judgment for the 1992 suit brings finality to that suit; it disposes of the rights of the parties thereto and it is a final order in the true legal sense of the word (see the *Bozson* test as set out in *Bozson v Altrinchman Urban District Council* [1903] 1 KB 547 and as applied in *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1982] 2 MLJ 94). These conclusions of mine are fortified by the following set of facts:

(1) Lee in the 1992 suit met Ong Sin Hock, an advocate and solicitor, in the latter's office sometime in early March 1992. In that meeting, the writ of summons and the statement of claim to the 1992 suit were shown to Ong Sin Hock and arising out of that meeting, Lee in the 1992 suit directed Ong Sin Hock to do the needful in order to protect the interests of all the defendants in the 1992 suit and this would include Siang in the present suit. Ong Sin Hock was also told that both Siang and Lee in the 1992 suit mere negotiating with Marushin in the 1992 suit for an amicable settlement. Ong Sin Hock advised Lee in the 1992 suit to contact Siang in the 1992 suit before any action could be taken on the matter. This was indeed a wise move adopted by Ong Sin Hock as events that subsequently unfolded bore testimony to his cautiousness.

(2) Later, Lee in the 1992 suit met Ong Sin Hock in his office. This time, Ong Sing Hock was given a letter of authority by Lee in the 1992 suit dated 9 March 1992 as stated and reproduced in the early part of this judgment and, in this meeting, Ong Sin Hock was told that Lee in the 1992 suit could not contact Siang in the 1992 suit and, in view of the constraint of time, Ong Sin Hock was given the mandate by Lee in the 1992 suit to act forthwith in order to protect the interests of all the defendants in the 1992 suit.

(3) By letter dated 11 March 1992 (see exh 'OSH 3' in encl 37) written by Ong Sin Hock to Malindo in the 1992 suit wherein it adverted to the telephone conversation between Lee in the 1992 suit and Ong Sing Hock and this resulted in the filing of the memorandum of appearance on behalf of all the defendants in the 1992 suit.

(4) That Ong Sin Hock was directed to negotiate a settlement as reflected in the letter dated 10 March 1992 and reproduced in the early part of this judgment.

The brief history as to how the consent judgment was entered between the parties are necessary and germane to narrate as it will show the state of mind of Ong Sin Hock as an advocate and solicitor of Tetuan Siti Rubiah & Ong in the present suit at that material time. It is my judgment, that what Ong Sing Hock did was perfectly above board and beyond reproach. Any lawyer in town faced with the same set of facts as did Ong Sin Hock would have acted in that manner. The professionalism of Ong Sin Hock was brought to the fore when he prepared the 'without

prejudice' letter dated 10 March 1992 as reproduced in the early part of this judgment. I have observed in *Oh Kuang Liang v Associated Wood Industries Sdn Bhd* [1995] 2 AMR 1872 especially at p 1877, the law in the following words which merit reproduction:

> I am of the considered view that the 'without prejudice rule' applies generally to exclude all negotiations genuinely aimed at settlements whether oral or in writing, from being given in evidence. A prudent and competent solicitor will always be on guard and will always label any negotiating correspondence with the words 'without prejudice'—to make known and to make clear beyond doubt that in the event the negotiations fell through, they are not to be referred to at the subsequent trial. I think the correct approach to resolve the 'without prejudice rule' would be by balancing two different public interests, namely, the public interest in promoting settlements, on the one hand, and the public interest in full discovery between parties to litigation, on the other.

What Ong Sin Hock affirmed to and that affimation which became part and parcel of encl 37 was not mere balderdash. It was supported in full force by Lee in the 1992 suit by way of an affidavit affirmed on 10 April 1995. I need not dwell at length on what Lee in the 1992 suit adverted to in his affidavit. Suffice for me to say that he supported Ong Sin Hock in all material aspects and this would surely strengthen the consent judgment entered into between all the parties to the 1992 suit.

Upon receipt of the writ of summons and the statement of claim a defendant can only submit himself to the jurisdiction of the court by entering an appearance. An appearance can only be entered once the writ is served on the defendant (*Lim Chong Construction Co Sdn Bhd v Silam Quarry Sdn Bhd* [1990] 2 MLJ 423 and RHC O 18 r 1). The memorandum of appearance dated 11 March 1992 filed by Tetuan Siti Rubiah & Ong in the present suit (see exh 'E' in encl 21A) for all the defendants in the 1992 suit was drafted unconditionally. This meant that all the defendants in the 1992 suit waived whatever defects in service that existed and willingly submitted, without a whimper, to the jurisdiction of the court (*Sheldon v Brown Bayley's Steel Works Ltd* [1953] 2 QB 393 and *The Avro International* [1988] 1 MLJ 147). That would certainly seal the fate of Siang in the present suit. To construe otherwise would run counter to the RHC and this is wrong in law. Must Marushin in the 1992 suit who happens to be the first defendant in the present suit investigate as to the facts leading to the filing of the memorandum of appearance dated 11 March 1992 before they negotiate for a settlement? Surely it is not the intention of the Rules Committee in making the RHC to require either the plaintiff or the defendant upon receipt of the memorandum of appearance to question its authenticity! In *Scott & English (M) Sdn Bhd v Yek Toh Ming* [1985] 1 MLJ 451, Chong Siew Fai J (now Chief Judge of Sabah and Sarawak) quoted with approval a passage appearing in 3 *Halsbury's Laws of England* (4th Ed) para 1179 which reads as follows:

> When Counsel appears in Court and states that he is instructed, the Court will not inquire into his authority to appear.

and this meant that the senior assistant registrar before whom the consent judgment in the 1992 suit was recorded need not inquire as to the authority to appear of the solitary counsel that appeared before her on 22 July 1992 (see exh 'A' of encl 40).

Harun J in *Yap Chee Meng v Ajinomoto (M) Bhd* [1978] 2 MLJ 249 at p 251 had this to say:

> As a general rule, it is against public policy to allow settlements concluded between solicitors on behalf of their respective clients in accident cases to be challenged with impunity. To do so would open the floodgates of endless litigation initiated by parties who become wise after the event.

Siang in the present suit says that he was in Canada between 13 March 1992 till 19 March 1992 when he returned to the country. Ong Sin Hock in his affidavit says that in early March 1992, Lee in the 1992 suit met him in his office with the writ of summons and the statement of Claim to the 1992 suit. Later, Ong Sin Hock in his affidavit says that Lee in the 1992 suit visited him and handed a letter dated 9 March 1992 authorizing him (Ong Sin Hock) to act and protect both the interests of Lee in the 1992 suit and also Siang in the 1992 suit who also happens to be the plaintiff in the present suit. It is pertinent to note that Siang in the present suit did not explain as to his whereabouts between 1 March 1992 to 12 March 1992 and neither did he explain where he was on 22 July 1992 when the consent judgment was recorded by the Senior Assistant Registrar. From the recital of the facts as set out in the early part of this judgment, I am convinced and it is my judgment that Ong Sin Hock's actions all point to there being implied authority for him to act on behalf of Siang in the present suit in regard to the 1992 suit (*Credit Corp (M) Bhd v Complete Information Search Sdn Bhd & Ors* (Civil Suit No D2-22-916-89) [1993] Mallal's Digest 141).

Learned counsel for Siang in the present suit argued that no person should be bound by a judgment which he is not a party to and he cited *Abuakwa v Adanse* [1957] 3 All ER 559 as an authority for his proposition. With respect, that case dealt with an estoppel by conduct in which a party who knew of, but took no part in, previous proceedings was bound by the decision in those proceedings. Here, the question of an estoppel by conduct was never raised by Siang in the present suit. Lord Denning in delivering the decision of the Privy Council in *Abuakwa v Adanse* (supra) had this to say (at p 561):

> The general rule of law undoubtedly is that no person is to be adversely affected by a judgment in an action to which he was not a party, because of the injustice of deciding an issue against him in his absence; but this general rule admits of two exceptions. One exception is that a person who is in privity with the parties, a 'privy' as he is called, is bound equally with the parties, in which case he is estopped by res judicata; the other is that a person may have so acted as to preclude himself from challenging the judgment, in which case he is estopped by his conduct. Their Lordships propose in this case to consider first estoppel by conduct.

Next, I was referred to the case of *S Pakianathan v RK Stallard* [1979] 2 MLJ 251, where the facts were that judgment had been entered against the appellant for broker's commission alleged to be lost as a result of the appellant's breach to perform his obligation as a guarantor under an agreement. The learned judge ordered the senior assistant registrar to assess damages. The senior assistant registrar made an order, with the consent of the then solicitor for the appellant, that the appellant pay the respondent A$42,375 as damages. The appellant thereupon applied to have the order set aside as he stated that the solicitor had no authority to give consent and that there was no sufficient evidence relating to the damages. Syed Othman FJ (as he then was) held that there would be grave injustice if the consent order was allowed to stand and therefore the order should be set aside. In the course of delivering his judgment, his Lordship referred to the case of *Marsden v Marsden* [1972] 2 All ER 1162 extracted from the *1979 White Book* (The Supreme Court Practice) Part 2 at p 607 where it was stated that:

> Where a party applies to have a consent order set aside on the ground that it was made without his consent and the application is made either before or contemporaneously with its being perfected, the court has a discretion to set aside the order where grave injustice would be done by allowing it to stand.

It is quite obvious that the facts in *S Pakianathan v RK Stallard* (supra) are poles apart from one present case. Here, Ong Sin Hock acted for Siang in the 1992 suit as directed by Lee in the 1992 suit where both these two defendants by a guarantee agreement agreed to bind themselves to Marushin in the 1992 suit. A memorandum of appearance filed by Tetuan Siti Rubiah & Ong in the present suit for all the defendants in the 1992 suit was subject to dispute. It is also quite plain that the principles laid down in *Marsden v Marsden* (supra) cannot apply to the facts of this case simply because here, unlike there, the consent judgment had been perfected and extracted and there cannot therefore be, as I stated earlier, any leeway for rectification by way of alteration or variation.

Finally, I was referred to the case of *Tan Lian Hong v Min Ngai Knitting Factory (M) Ltd & Anor* [1974] 1 MLJ 76, where Chang Min Tat J (as he then was) observed:

> *Ex hypothesi*, a solicitor can act for their clients only on their instructions. If he acts for someone without instructions, that someone has a clear right to have the appearance vacated : *Re Gray, Gray v Coles* (1891) 65 LT 743; *Yonge v Toynbee* [1910] 1 KB 215, CA; and *The Neptune* [1919] P 21.

The facts in *Tan Lian Hong*'s case (supra) can be gleaned from the judgment of his Lordship Chang Min Tat J (as he then was) at p 76 which merit verbatim reproduction:

> A consequence of the accident is that the second defendant is now untraced, possibly as the result of dismissal from the factory. No authority to act for her was therefore given by her either in writing or orally to the

> solicitors who entered an appearance gratis for her as well as the first defendant and who were obviously retained by the insurers of a Workman's Compensation policy.
>
> Objection is now taken by the plaintiff to the entry of appearance on the ground of want of authority. The reasons for so doing are transparent enough. It is not a question of selfless devotion to rules. It is purely tactical. If the second defendant does not appear or defend, then the way is cleared for a default judgment, which without any negligence on its own part, the first defendant must satisfy. Her appearance must be improbable since the next stage would be an application for substituted service on her which would be ordered but which it is doubted would be factually sufficient to bring the action to her notice.

Thus, on the facts, *Tan Lian Hong*'s case can easily be distinguished from our present case.

Next, to whittle down the legal impact of the guarantee agreement, it was argued that though Siang in the present suit had signed that guarantee agreement, yet at the time of signing it was said that that guarantee agreement was undated. It is trite that when a party signs a contract knowing it to be a contract which governs the relations between them, then to borrow the words of Denning LJ in the case of *Curtis v Chemical Cleaning and Dyeing Co Ltd* [1951] 1 All ER 631 at pp 633–634 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'. Applying this principle of law to the present case, the admission of Siang in the present suit that he signed the guarantee agreement ought by itself tie him to the guarantee agreement without having to consider the questions of fraud and misrepresentation. Taking a step further and applying *L'Estrange v F Graucob Ltd* [1934] 2 KB 394, where Scrutton LJ said (at p 403): 'When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.' Applying *L'Estrange* to the facts of the present case, it matters not that the guarantee agreement was undated when Siang in the present suit signed it because he signed that document in his capacity as a director of Malindo (the first defendant in the 1992 suit) and without any allegations of fraud or misrepresentation.

Next, the allegations by Siang in the present suit that he did not receive the writ of summons and the statement of claim to the 1992 suit must not be read in isolation but must be read in the context of the letter dated 9 March 1992 that was addressed to Ong Sin Hock from Lee in the 1992 suit. It must not be forgotten that when Lee to the 1992 suit wrote that letter he was concerned about Siang in the 1992 suit; his concern was reflected in that letter. Even though Siang in the 1992 suit had resigned his directorship on 24 September 1991, yet the 1992 suit was in relation to the guarantee agreement. This must be the reason for the concern of Lee to the 1992 suit. With the benefit of hindsight, on 9 March 1992, Siang in the 1992 suit was still in the country — he has yet to proceed to Canada. Furthermore, Siang's

allegations were answered by the affidavits of Ong Sin Hock and Lee. Ong Sin Hock had been cautious in his dealings with Lee throughout the whole episode. In Ong Sin Hock's letter dated 10 March 1992, the opening paragraph thereof which reads: 'We act for the abovenamed defendants who have forwarded to us the copy of the said Summons with instructions to reply thereto.' Clearly shows that Ong Sin Hock acted for all the defendants in the 1992 suit and Ong Sin Hock's implied authority to act for Siang came from Lee. All these facts taken together would render immaterial the allegations by Siang to the 1992 suit and these allegations can be said to be a mere storm in the teacup. Siang in the 1992 suit cannot run away from his responsiblity under the guarantee agreement and since the consent judgment has been perfected, extracted and sealed, he must abide by it. I must sound a warning to Siang in the 1992 suit that in the event he refuses to obey the consent judgment he might open himself to contempt proceedings. However, this is not the end of the road for Siang. He can still redress his grievance against Lee in a court of law.

There is one other matter that needs mention. It is this. All the parties agreed that the affidavits and the exhibits annexed thereto were materials for this court to deliberate upon and, consequently, to adjudicate encls 21 and 37 without the necessity of adducing evidence through witnesses. This concession makes sense and is truly appreciated by this court. Incidentally, the present case turned on the construction of documents and it would be pointless to go formally to trial where no further facts would emerge to throw further light on those documents that had to be construed (*Esso Standard Malaya Bhd v Southern Cross Airways (M) Bhd* [1972] 1 MLJ 168 as cited in *Fadzil bin Mohamed Noor v Universiti Teknologi Malaysia* [1981] 2 MLJ 196).

For these reasons, I granted prayers 1 and 5 in encl 21 and prayers 1 and 4 in encl 37 respectively.

Application allowed.

Reported by KH Teo